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Supreme Court, U.S.
DEC
Clerk

No. 560

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

LEE OLIPHANT ET AL.,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Negro locomotive firemen, on their own behalf and as representatives of the class of Negro locomotive firemen, pray that a writ of certiorari issue to review the judgment in this case of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinion of the District Court for the Northern District of Ohio is reported at 156 F. Supp. 89 and appears at pp. 298-304 of the Joint Appendix.[1] The opinion of the Court of Appeals for the Sixth Circuit is not yet reported, but is printed as Appendix A, *infra*, p. 24.

Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit were entered on November 26, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

The Brotherhood of Locomotive Firemen and Enginemen is the exclusive bargaining representative under the Railway Labor Act for the craft or class of locomotive firemen and as such the Brotherhood represents Negro as well as white firemen in their collective bargaining relationships with the employing railroads. The Brotherhood refuses to admit Negro firemen to membership solely because of their color and thus denies them voice and vote in the formulation of bargaining objectives and the selection of bargaining officials. Does this action by the Brotherhood:

(1) Deny to Negro firemen their right under the Railway Labor Act to fair and equal representation by their exclusive bargaining representative?

(2) Violate the due process provision of the Fifth Amendment in that it constitutes arbitrary exclusion from the statutory bargaining process by an agency sufficiently

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[1] The Joint Appendix was printed as the record in the Court of Appeals and is attached to this petition for certiorari for the convenience of the Court.

"governmental" in nature to warrant the application of constitutional safeguards?

Statute Involved

The statute involved is the Railway Labor Act, 45 U.S.C. 151 et seq., pertinent provisions of which are set forth in Appendix B, *infra*, p. 32.

Statement

Petitioners, Negro firemen, brought this action in the District Court for themselves and others similarly situated, challenging their exclusion from their exclusive bargaining representative under the Railway Labor Act, the Brotherhood of Locomotive Firemen and Enginemen, whose Constitution limits its membership to persons "white born" (J.A. 35). Petitioners seek admission into the Brotherhood on the ground that the fair and equal bargaining representation which the Brotherhood is legally obligated to provide Negro firemen under the *Steele* doctrine,[2] the Railway Labor Act, and the Fifth Amendment, is denied them as long as they are excluded from participation in the formulation of the Brotherhood's bargaining objectives and denied voice and vote in the selection of its bargaining officials.

The essential facts concerning petitioners' exclusion from Brotherhood membership and the consequent denial of voice, vote and even information with respect to collective bargaining are not in dispute. The Brotherhood's exclusive bargaining relationship status under the Railway Labor Act (J.A. 20), its limitation of membership pursuant to the Brotherhood Constitution to persons "white born"

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[2] *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; see also *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768; *Syres* v. *Oil Workers*, 350 U.S. 892; *Conley* v. *Gibson*, 355 U.S. 41.

(J.A. 34, 35), and the exclusion of Negro firemen from the elections wherein the bargaining officials are chosen (J.A. 218), are all conceded by respondents. Not only do respondents admit the denial to Negro firemen of voice and vote in the selection of the bargaining officials, but they concede further serious disadvantage to Negro firemen arising from the denial of opportunity to participate in the Brotherhood's deliberations or even to be informed thereof: In answers to petitioners' interrogatories prior to trial (J.A. 32-33), respondents admitted (Interrogatories 1 and 2) that monthly or quarterly reports to lodges and local chairmen by the General Chairman of the Brotherhood, which reports are not "readily available" to non-members, include information about "demands served upon railroads for agreements on new matters and changes in the existing collective agreement, served under Section 6 of the Railway Labor Act, and also information regarding the progressing of such demands in collective bargaining"; that "the President of the Brotherhood is required by the Constitution of the Brotherhood to issue monthly bulletins or circulars to other Grand Lodge officers, recording secretaries of lodges, legislative representatives, General and Local Chairmen, and Secretaries of General Grievance Committees, of the work of collective bargaining conducted by the Brotherhood on a national or regional scale, and of other matters of interest to the membership as a whole" (Interrogatory 3), which sources of information are not readily available to non-members (Interrogatory 4); and that non-members cannot attend Local Lodge meetings where "matters of general interest to locomotive firemen are discussed" including "reports of negotiations with carriers regarding changes in the governing agreement, decisions on time claims and grievance cases, assignments of runs and possible or impending changes in

assignment of runs, the set-up of pools, etc." (Interrogatories 5 and 6).[3]

Petitioners could have rested upon these admitted facts of their exclusion from membership and thus from all voice and vote in the formulation of bargaining objectives and the selection of their bargaining officials. At the trial, however, petitioners went even further to show the various forms of hostile discrimination and unfair treatment to which they have so long been subjected by the Brotherhood and which they will continue to suffer so long as they are denied political power within the the agency which controls their conditions of employment. Petitioners demonstrated that for over fifty years the Brotherhood and its officers have sought to limit the employment rights of Negro firemen and to eliminate them from the railroads and replace them with white Brotherhood members (J.A. 211-215; 238-243; 306-322).[4] Petitioners' witnesses produced evidence of continuing discrimination and hostility by the Brother-

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[3] The respondents have had the temerity to suggest throughout this litigation that an appropriate substitute for the information supplied to Brotherhood members in these different ways is the availability to Negro firemen of the Brotherhood's monthly magazine and of the weekly newspaper "Labor" published by sixteen railway labor organizations (see e.g., Brief On Behalf Of Appellees in the court below, pp. 14-15). Nothing could better demonstrate the cavalier attitude of the Brotherhood towards Negro firemen and the consequent impossibility of fair and equal representation without membership.

[4] This Court has expressed itself vigorously upon the Brotherhood's record of discrimination and hostility. *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen*, 323 U.S. 210; *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. The latest case in this series, *Graham*, involved the refusal by respondents to accept this Court's earlier decisions in *Steele* and *Tunstall*, evoking this Court's sharp comment on the discriminatory practices of the Brotherhood:

"It is needless to recite additional details of the present case. What it adds to the governing facts of the earlier cases is a continuing and

hood right down to the present day: special privileges recently accorded white firemen over Negroes (J.A. 48-50); white firemen regularly permitted to earn more pay than Negroes (J.A. 104); a bribe the Brotherhood offered so that a white fireman could take a Negro's job (J.A. 86-88); a Negro fireman unable to get his days off on the weekend, so he could go to church, a privilege accorded to white firemen (J.A. 130-132); a white "swing man" recently added to a run to reduce the mileage of Negro firemen (J.A. 137-140); the Brotherhood's refusal to take up grievances for the Negro firemen (J.A. 54-55, 159-161) and to its failure to help equalize facilities for them (J.A. 56, 89, 129-130). A dramatic piece of evidence of the Brotherhood's attitude towards the voteless Negroes it represents in collective bargaining was the testimony of a seventy-year-old fireman on the Gulf, Mobile & Ohio Railroad. He related the statement made to him by the Brotherhood's General Chairman in 1951 after Federal District Judge Mullins had entered a decree pursuant to the *Steele* doctrine for the protection of Negro firemen: "Judge Mullins gave it to you but I will sure as hell see you don't keep it" (J.A. 75).[5]

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willful disregard of rights which this Court in unmistakable terms has said must be accorded to Negro firemen."

The Court's view of the Brotherhood's conduct can be seen also in its unusual action in *Graham* of ordering its mandate to go down "forthwith", thus seeking to end "continuing and willful disregard of rights" of Negroes at the earliest possible moment.

The Brotherhood sought below to shrug off this Court's decisions with the comment that its arguments had not "*stood much chance of being heard above the cry of race prejudice that dominated this litigation*" (Brief, p. 5).

[5] Respondents attempted no direct refutation of this demonstrated continuing hostility and discrimination. *None* of the local brotherhood officials to whom petitioners' witnesses ascribed hostile and discriminatory conduct were called in rebuttal. Respondents' case, as presented by three of its highest officials, amounted to no more than a series of self-serving generalizations concerning Brotherhood policies which provided no refutation whatever of the specific testimony concerning specific acts of discrimination by specified Brotherhood officers (J.A. 168, 243, 271).

In the light of the conceded exclusion of petitioners from the meetings where firemen deliberate upon and formulate bargaining objectives and select and elect the bargaining officials, the District Court was compelled to find and found that petitioners' exclusion from the Brotherhood denies them equality in the statutory bargaining process: "There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their conditions of employment and other matters relating to such employment" (J.A. 300). Nevertheless, the Court could find neither statutory nor constitutional authority to require admission of petitioners into the Brotherhood. In enacting the Railway Labor Act, the Court said, "Congress did not intend to require admission of Negroes to membership" (J.A. 301). As concerns the Fifth Amendment's due process guarantee, the Court found it inapplicable because "the certification of the Brotherhood of Locomotive Firemen and Enginemen as exclusive bargaining representative . . . is not sufficient to change the character of the organization from that of a private association to that of a governmental agency"[6] (J.A. 303).

The Court of Appeals affirmed. Although recognizing that a "Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its Local

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[6] While petitioners' case was pending on appeal in the Court of Appeals for the Sixth Circuit, this Court had under consideration *Conley* v. *Gibson*, 355 U.S. 41. Because the briefs in the *Conley* case appeared to raise a question of exclusion from union membership, petitioners sought certiorari before judgment in the Court of Appeals so that the two cases might be considered together. The *Conley* case was decided, however, without reference to the issue of denial of union membership and thereafter this Court denied certiorari before judgment. 355 U.S. 893.

Lodges", a two-judge panel [7] ruled against petitioners "for the reason that this record does not show an agency of the federal government to have been responsible for appellants' plight." Denominating the Brotherhood "a private association" not subject to "judicial control", the Court adopted the view of the trial court that sufficient "federal action" was not presented to "subject the membership policies of the . . . Brotherhood to judicial control." [8]

REASONS FOR GRANTING THE WRIT

The Holding of the Court Below, Which Sanctions Exclusion of Negroes from Their Exclusive Bargaining Agent Under the Railway Labor Act, Raises Important Federal Questions and Conflicts With Applicable Decisions of This Court.

Solely because of their color (J.A. 35), petitioners are denied membership in the Brotherhood which is their exclusive bargaining representative under the provisions of the Railway Labor Act with the various railroads upon which petitioners are employed (J.A. 20). Without membership in the Brotherhood, petitioners cannot participate in the selection and election of the Brotherhood officials who do the bargaining and cannot attend the Brotherhood meetings

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[7] The case was argued to a panel of the Court consisting of Circuit Judges Martin, Miller and Stewart. While the case was awaiting decision, Judge Stewart became an Associate Justice of this Court and did not participate in the decision, opinion or judgment below. See p. 31, *infra*.

[8] Neither court below questioned the fact that under the *Steele* case the Brotherhood is sufficiently "governmental" to warrant judicial invalidation of agreements bargained in violation of its duty of equal representation. But both courts held that the Brotherhood is not sufficiently "governmental" to warrant judicial relief to secure equal voice in the bargaining process by all members of the craft. Although petitioners' counsel continuously urged the applicability of *Steele* and following cases, neither court examined or sought to distinguish *Steele*.

where the bargaining objectives are discussed (J.A. 33, 218). The courts below refused to hold that this discrimination in "representation and participation" (J.A. 300) flowing from the exclusion of petitioners from Brotherhood membership violates their rights either under the Fifth Amendment or the Railway Labor Act.

The constitutional and statutory question thus presented is an important one calling for this Court's review.[9] The racial exclusion still practiced by some of the nation's largest labor unions, renders a substantial number of Negroes second class citizens in collective bargaining under federal law.[10] See Sections A & B, pp. 9 to 16, *infra*. This racial exclusion continues despite the repeated decisions of this Court holding statutory bargaining representatives and analogous agencies to standards of non-discriminatory conduct no less rigorous than those constitutionally imposed on governmental bodies. See Section C, pp. 17 to 21, *infra*. Finally, the day-to-day racially discriminatory exercise of federally-supported exclusive bargaining power is wholly inconsistent with public acceptance of this Court's decisions requiring elimination of segregation in state-supported institutions. See Section D, pp. 21-22, *infra*.

A. *The exercise of exclusive statutory bargaining power for Negroes by officials chosen by members of a union open only to white raises a vital Fifth Amendment issue.*

Without membership and participation Negro workers are denied the equal representation which the Constitu-

[9] Informative discussion may be found in Hewitt, *The Right to Membership in a Labor Union*, 99 Univ. of Pa. Law Rev. 919, and Summers, *The Right to Join a Union*, 47 Col. Law Rev. 33.

[10] See Handbook of Union Government Structure and Procedures (1955), National Industrial Conference Board, Inc., pp. 63-64.

tion guarantees to all persons regardless of race in the exercise by a statutory bargaining representative of federally-created exclusive bargaining power. Available judicial authorities support this proposition.

In *Betts* v. *Easley*, 161 Kan. 459, 169 P. 2d 831, the Supreme Court of Kansas was of the opinion that a collective bargaining agent under the Railway Labor Act cannot "lawfully exclude eligible Negro workmen from full participation in privileges incident to the Act and admit them to membership only in a 'separate lodge' which 'shall be under the jurisdiction of and represented by the delegate of the nearest white local.'" The Court held:

> "The petition alleges not only that Negro employees are denied the right to take part in such local affairs of the union as the election of officers and the fixing of dues, but are denied the right to participate in determining the position to be taken by the union, as bargaining agent for all employees, as to wages, hours, working conditions, and other such matters vitally affecting their economic welfare. . . . The acts complained of are in violation of the Fifth Amendment."[11]

An eloquent exposition of the difference between equal representation through equal participation and unequal representation through non-participation is found in the late Chief Judge Groner's concurring opinion in

[11] Respondents below cited *Ross* v. *Ebert*, 275 Wisc. 523, 82 N.W. 2d 315, a decision of the Wisconsin Supreme Court, as holding to the contrary. That decision, however, has no bearing upon the instant case because the defendant union there was not the statutory bargaining representative for the aggrieved Negro workers. Petitioners here predicate their right to membership on the ground that respondent Brotherhood, the exclusive statutory bargaining representative, may not bar Negroes from participation in the statutory bargaining process. The decision in *Ross* is thus not in any sense inconsistent with the petitioners' cause of action.

Brotherhood of Railway and Steamship Clerks v. *United Transport Service Employees*, 137 F. 2d 817, 820 (C.A.D.C. 1943), reversed by this Court on other grounds, 320 U.S. 715. Judge Groner compared the system of representation without participation employed by certain national labor unions with the "taxation without representation" to whose evils history gives eloquent attestation. Speaking of the effect of the action of the National Mediation Board in placing Negro employees in a bargaining unit represented by a Brotherhood in which they could not become members, Judge Groner said:

> "The effect of the action of the Board is to force this particular group of employees to accept representation by an organization in which it has no right to membership, nor right to speak or be heard in its own behalf. This obviously is wrong and, if assented to, would create an intolerable situation. That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us, but that the Brotherhood, in combination with the employer, should force on these men this proscription and at the same time insist that the Brotherhood alone is entitled to speak for them in the regulation of their hours of work, rates of pay and the redress of their grievances is so inadmissible, so palpably unjust and so opposed to the primary principles of the [Railway Labor] Act as to make the Board's decision upholding it wholly untenable and arbitrary . . . . nothing in the Act nor in its construction by the courts can be found to justify such coercive action as to force upon any class of employees representation through an agency with whom it has no affiliation nor right of association."

The Supreme Court of California has said of such racially-exclusive "representation" as here involved:

> "It is difficult to see how a union can fairly represent *all* the employees of a bargaining unit unless it is willing to admit all to membership, giving them the opportunity to vote for union leaders and to participate in determining union policies." *James* v. *Marinship Corp.*, 25 Cal. 2d 721, 735, 155 P. 2d 329.

Finally, this Court itself has said of collective bargaining "representation" without participation that:

> "To deny a fellow-employee membership because of race, color or creed may operate to prevent that employee from having any part in the determination of labor policies to be promoted and adopted in the industry and deprive him of all means of protection from unfair treatment arising out of the fact that the terms imposed by a dominant union apply to all employees, whether union members or not." *Railway Mail Ass'n.* v. *Corsi*, 326 U.S. 88, 94.

Denial of voice and vote in the election of bargaining representatives and the formulation of bargaining objectives manifestly denies Negro firemen equal representation. Equal participation in a fair hearing before a representative tribunal is the sine qua non of a fair decision. It was the judgment of the founding fathers, one repeatedly validated by the teaching of experience, that without the right of free participation before a representative tribunal, substantive determination is necessarily tainted.

When the respondent Brotherhood deprives Negro firemen of membership, closing to Negroes the doors of the Brotherhood meeting where bargaining objectives are formulated and forcing upon them exclusive representation

by bargaining officials in whose selection they have no vote, it denies rights without which the bargained conditions of employment are constitutionally tainted, whether or not those conditions of employment be fair and equal or unfair and discriminatory.[12] Equal statutory bargaining representation for Negro workers requires equal participation in the bargaining process, regardless of race, no less than it requires that the bargained agreement afford equal treatment to all workers, regardless of race.

And while participation in the bargaining representative and the bargaining process is constitutionally required in order to afford Negro firemen equality of representation, membership and participation is constitutionally required for its own sake as well. Membership in a union which is the statutory bargaining representative affords vital ad-

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[12] There is no question in this case that petitioners are discriminated against in the sense that they are denied voice, vote and information in the determination of their working conditions. Proof that the working conditions bargained are themselves actually discriminatory is not a necessary part of petitioners' case, but petitioners will, if certiorari is granted, demonstrate on this record the extent to which exclusion from the statutory bargaining agent necessarily results in, and did here result in, actual discrimination against them. The court below indicated that there was no "issue of actual discrimination by the Brotherhood" in this case. See pp. 26, 28, *infra*. In so indicating, the court misconstrued the findings of the District Judge who had apparently found actual discrimination in the day-to-day operations of the Brotherhood (J.A. 300) but was unable to "state definitely" (J.A. 299) that certain major bargaining changes negotiated by the Brotherhood reducing mileage and the like, were adopted "for the purpose of discrimination against the Negroes" (J.A. 299). Since the testimony concerning day-to-day discrimination was never controverted (see n. 5, p. 6, *supra*), the District Court did not find, and indeed could not have found, an absence of actual discrimination. Furthermore, whatever may have been the *purpose* of some of the major mileage changes negotiated by the Brotherhood, it is undeniable that their primary *effect* is upon Negro firemen, who hold the highest seniority in their craft, and who have been reduced in mileage for the benefit of junior white firemen. Given political power within the union to select bargaining officials, it is by no means inconceivable that some of these mileage changes having primary adverse effect upon Negro firemen might successfully have been resisted by them.

vantages to the member. Participation with fellow workers in the formulation of bargaining objectives through debate and persuasion and the possibility of election to officership with consequent participation in negotiations with the employer is in itself a right not to be lightly discounted. The assumption of collective responsibilities through officership and participation in the group deliberations which precede negotiations with the employer provide experience and relationships essential to the growth and advancement of the individual among his fellow workers and in his employment.[13]

We think it clear that the Fifth Amendment forbids the exercise of exclusive statutory bargaining power for Negroes by a union open only to whites and compels statutory bargaining representatives to exercise their bargaining power only through a process of free membership participation available to all regardless of race.[14] In any event, the question is of such manifest importance as to require review by this Court.

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[13] It is advantages of this sort upon which this Court based its earlier determinations against segregation in higher education, which deprives Negroes of social and psychological benefits available to persons attending white universities. *McLaurin* v. *Oklahoma State Regents*, 339 U.S. 637; *Sweatt* v. *Painter*, 339 U.S. 629.

[14] Respondents argued below that petitioners would not benefit from membership because the Brotherhood's bargaining officials are unresponsive to the will of the membership. They said that members of the Brotherhood do not determine Brotherhood policy or decide upon its collective bargaining objectives since the officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership (Brief, pp. 15-17).

Perhaps undemocratic practices of the union will render petitioners' membership in the Brotherhood less valuable than hoped, but this hardly excuses denial of the right altogether. Racial exclusion cannot be justified by the circumstance that, once admitted, the Brotherhood will refuse petitioners effective control over the Brotherhood's bargaining decisions not because they are Negroes, but because the bargaining officials do not heed the expressed desires of the membership. Indeed, respondents' insistence that its bargaining officials determine bargaining objectives

B. *Racial exclusion from membership and participation in the bargaining representative raises an important question under the Railway Labor Act.*

A construction of the Railway Labor Act which avoids the necessity of a constitutional adjudication (see *United States* v. *Rumely*, 345 U.S. 41; *United States* v. *CIO*, 335 U.S. 106) is readily available here. Petitioners urged the courts below and ask this Court to read the Railway Labor Act to forbid racial exclusion by the statutory bargaining representative, and thus to avoid the necessity of a constitutional adjudication. Indeed, petitioners ask for little if any extension of the construction of the Act already adopted by this Court in *Steele*, for racial exclusion from participation is necessarily precluded by the very requirement of equal representation this Court there found implicit in the Railway Labor Act.

Moreover, denial of participation is not only incompatible with implied requirements but is likewise precluded by the language of the Railway Labor Act. Congress provided in that Act (45 U.S.C. 152, Fourth) that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." The very term "representatives" denotes persons chosen by vote of the class whom they represent. The right to bargain "*through representatives of their own choosing*" is plainly denied petitioners by virtue of their exclusion from the Brotherhood whose members alone select and elect the bargaining officials.

The courts below refused to find in the Railway Labor Act a proscription of racial exclusion, declaring that "Ap-

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uncontrolled by any dictation from the membership defeats their argument; if respondents' claims of benevolent union paternalism by the bargaining officials are correct, denial to Negroes of the ballot in the election of those officials subjects them not only to racial paternalism but to racial autocracy as well.

parently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required," (J.A. 302-303; p. 27, *infra*). This conclusion was predicated on the Senate's rejection, fifteen years after the enactment of the Railway Labor Act, of an amendment proposed by Senator Jenner which would have prohibited racial exclusion by the statutory representative.[15] But the Senate Committee Report on the bill which Senator Jenner sought to amend (Senate Rep. No. 2262, 81st Cong., 2d Sess.) specifically preserved the vitality of the doctrine in the *Steele* case at a time (1950) when the Supreme Courts of Kansas and California had already found that doctrine to preclude racial exclusion by the bargaining representative. *Betts* v. *Easley, supra; James* v. *Marinship Corp., supra.* The rejection by the Senate of Senator Jenner's amendment is properly construed as having been intended merely to leave the problem of union racial exclusion in the hands of the courts, which had already asserted judicial authority to grant relief against discriminatory and exclusionary practices.

Judicial comity towards the legislature and the presumption that Congress acts in good faith compels the conclusion that Congress has not authorized the racially exclusive exercise of statutory power by the statutory representative. At any rate, the question whether Congress has authorized or prohibited racial exclusion by the bargaining agent under the Railway Labor Act should not longer be left in doubt.

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[15] This amendment was proposed during the enactment of the union-shop amendment to the Railway Labor Act. Act of Jan. 10, 1951, 64 Stat. 1238.

C. *The holding of the court below disregards this Court's rulings concerning the private exercise of governmental and governmentally derived responsibilities.*

The court below rests its decision on the assertion that "the Brotherhood is a private association, whose membership policies are its own affair . . " (p. 30, *infra*). Though recognizing petitioners' plight, the court below insists that petitioners did "not show an agency of the federal government to have been responsible for . . . "[this] plight" (p. 30, *infra*) and affirmed the District Court's holding that "sufficient federal action was not present to subject the membership policies of the . . . Brotherhood to judicial control" (p. 24, *infra*). We respectfully submit that the holding below that the exclusive statutory bargaining agent under the Railway Labor Act is a "private association" free from judicial control in its exercise of statutory bargaining power conflicts with the applicable decisions of this Court.

In *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, this Court interpreted the Railway Labor Act to impose upon the very Brotherhood here involved the duty of fair and equal representation of Negro firemen and it found this duty imposed by the Railway Labor Act because grave constitutional questions would have accompanied any other result. Speaking of the respondent Brotherhood, this Court stated that it is "clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which is also under an affirmative constitutional duty equally to protect those rights" (323 U.S. at 198). In the same vein, the Court pointed out that "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and re-

strict the rights of those whom it represents . . ." (323 U.S. at 202). The Brotherhood's argument that it was a "private association", not subject to judicial review of its discriminatory practices, received short shrift in this Court for the precise reason that the Court found the Brotherhood clothed "with powers comparable to those possessed by a legislative body . . ." Certainly, if the Brotherhood is sufficiently "governmental" in nature to require that it give equal representation to Negro firemen, it is sufficiently "governmental" in nature to require that it give those Negro firemen the membership and participation indispensable to afford them equal representation.[16]

In *American Communications Ass'n.* v. *Douds*, 339 U.S. 382, 401-402, this Court made clear that labor unions clothed "with powers comparable to those possessed by a legislative body" are, for some purposes at least, to be treated as "governmental." The Court there said:

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[16] Respondents have sought to make much of the statement in the *Steele* case that the Railway Labor Act "does not deny to such a bargaining labor organization the right to determine eligibility to its membership . . ." 323 U.S. at 204. But this statement could hardly have been an approval by the Court of the very racial discrimination which it had just termed "obviously irrelevant and invidious" (323 U.S. at 203). Furthermore, if this statement could conceivably be construed, contrary to both the letter and spirit of *Steele*, as a dictum permitting racial exclusion, it certainly could not have survived this Court's recent decision that separation of the races is inherently unequal treatment. Indeed, the enforced inequality of racial segregation is far clearer in the labor area than in education. In finding segregated schooling inherently unequal, this Court emphasized the resulting psychological and social barriers for Negroes. The inequalities involved here are even more obvious; petitioners do not sue for the right to non-segregated instruction, but for the right to participate with their white fellow-workers in the meetings and elections at which their most vital and fundamental rights are determined—the hours of labor, wages, retirement age, runs, assignments—all the working conditions bargained with the employers. If the Fifth Amendment precludes segregation and exclusion of Negroes in public education, it necessarily precludes segregation and exclusion of Negro firemen from the election of those who exercise statutory bargaining power on their behalf and from participation in the statutory bargaining process whereby their employment rights are determined.

"Because of the necessity to have strong unions to bargain on equal terms with strong employers, individual employees are required by law to sacrifice rights which, in some cases, are valuable to them. See *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332 (1944). The loss of individual rights for the greater benefit of the group results in a tremendous increase in the power of the representative of the group—the union. But power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself. See *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232; *Steele* v. *Louisville & N. R. Co.*, 323 U.S. 192; *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210; *Wallace Corp.* v. *National Labor Relations Board*, 323 U.S. 248, 255; *Railway Mail Association* v. *Corsi*, 326 U.S. 88, 94.

We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such. But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents,' the public interest in the good faith exercise of that power is very great."

Certainly, the minimum obligation that the Brotherhood incurs for the Government's "thumb on the scales" is allowance of equal participation by all whom it represents, irrespective of their race, creed or color.[17]

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[17] By establishing the statutory bargaining scheme and empowering the representative exclusively to act for all, Congress has not only put its thumb on the scales but has itself created the scales and prescribed the

Actually, this Court went even further in *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 768, than in either of the two foregoing cases. In *Howard*, this Court squarely held that a union given statutory bargaining rights under the Railway Labor Act could not use its "position and power to destroy colored workers' jobs in order to bestow them on white workers" (343 U.S. at 774) even though the union had no statutory bargaining relationship to those colored workers. The Court stated unequivocally that "bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers" (343 U.S. at 774). The *Howard* case thus holds a statutory bargaining agent under the Railway Labor Act to a far higher standard of conduct than that for which petitioners here contend; it holds that a statutory bargaining agent may not arbitrarily exercise its power even against those for whom it holds no statutory responsibility. Certainly, if a union is held to standards of fairness in its action towards those it does not legally represent, it cannot be subject to less stringent standards in its exercise, for those whom it does represent, of the federally-derived statutory power itself.

The question to what extent private agencies may be held to governmental standards of conduct has been many times considered in recent years. See, e.g., *Smith* v. *Allwright*, 321 U.S. 649; *Marsh* v. *Alabama*, 326 U.S. 501; *Shelley* v. *Kraemer*, 334 U.S. 1; *Public Utilities Commission* v. *Pollak*, 343 U.S. 451; *Terry* v. *Adams*, 345 U.S. 461; *Barrows* v.

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weights to be put thereon. If in a day when federal laws have reshaped entire areas of personal activity and economic reality, as they have in the labor field, basic constitutional prohibitions do not accompany statutory powers vested in private persons, then Congress may do by indirection in the most fundamental and far-reaching conditions of employment what it could not do directly with respect to the smallest and least significant matter of federal concern.

Jackson, 346 U.S. 249; *Pennsylvania v. Board of Directors*, 353 U.S. 230. Certainly the consistent trend of this Court's decisions is towards holding those exercising governmental or governmentally-derived power to a standard of non-discriminatory conduct. Petitioners' case requires no more than the reiteration of a principle to which this Court has adhered in a firm line of prior decisions.

D. *Negro membership in labor unions will further the orderly elimination of segregation.*

Racial exclusion is still practiced by some of the Nation's largest labor unions.[18] The corrosive effect of racial segregation and exclusion by these powerful statutory bargaining representatives is not limited to the Negroes who are deprived of a voice in the determination of their rights, nor to the whites who close the doors of the union hall to their Negro fellow workers; the racial exclusion practiced by these unions is a continuous threat to the elimination of segregation in public schools, public facilities, and other vital areas. The picture of a labor union exercising federally-created exclusive bargaining power over disenfranchised Negro employees is a constant reminder of federally-sanctioned second-class citizenship, wholly inconsistent with and contrary to public acceptance of federal equality guarantees.

A reversal of this picture through the accomplishment of labor union integration would be an important forward step in that process of orderly adjustment which this Court is seeking to insure by its "deliberate-speed" mandate. Integration in the field of labor would advance public acceptance of integration in other areas of community life where, unlike

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[18] See Handbook of Union Government Structure and Procedures (1955), National Industrial Conference Board, Inc., pp. 63-64.

the situation found in the labor movement, the races have not previously had regular contacts and common interests. What we have here are white and Negro workers who work together, eat together, go on strike together, and share those personal ties which render the continued exclusion of the Negro firemen from the Brotherhood a cruel and corrosive vestige of a bygone era.[19]

An authoritative determination by this Court that statutory bargaining representatives may not exclude Negroes from membership would at once eliminate an ugly racial practice ostensibly carried on under federal auspices, and at the same time promote the program of "deliberate-speed" desegregation by demonstrating the ability of whites and Negroes to engage in constructive common activity in an integrated union hall.

Conclusion

Petitioners and the others in their class, all advanced in age because almost no Negro firemen have been hired for many years, desire first-class union citizenship before they are forced to depart from the railroads by death or retirement. The present action has been pending in the courts for over four years. Recognizing that petitioners have long suffered hostile discrimination at the hands of the very men who are authorized by federal law to represent them, this Court has in the past seen fit to take speedy action to protect their rights. See, e.g., *Graham* v. *Brotherhood of Locomotive Firemen and Enginemen*, 338 U.S. 232. We respectfully urge that the Court grant certiorari to

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[19] Continuing exclusion of Negroes is rendered all the more anomalous by the fact that it is practiced primarily by large national unions neither controlled nor dominated by Southern members, and defended on no better grounds than the antiquity of the racial barrier in the union's constitution.

determine the vital issues here involved and that it set the case for argument at this term of Court.

Respectfully submitted,

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December, 1958.

APPENDIX A

No. 13,387

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

LEE OLIPHANT, ET AL, *Appellants*,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL., *Appellees*.

Appeal from the United States District Court for the Northern District of Ohio

Decided November 26, 1958

BEFORE MARTIN and MILLER, Circuit Judges.

PER CURIAM. Appellants are Negro firemen who brought suit in the United States District Court for themselves and others similarly situated, seeking admission to membership in the Brotherhood of Locomotive Firemen and Enginemen whose constitution limits membership to applicants "white born". This appeal is from an order of the United States District Court denying the relief requested, for the reason that sufficient federal action was not present to subject the membership policies of the Appellee Brotherhood to judicial control. The opinion of the district court may be found at 156 F. Supp. 89; certiorari denied, 355 U. S. 893.

The Brotherhood is and for many years has been designated, in accordance with the Railway Labor Act [45 U. S. C. A., 151, et seq.], as the statutory bargaining representative for the locomotive firemen, hostlers, and hostler helpers, hereinafter collectively referred to as "firemen". A Negro fireman cannot become a member of the Brotherhood under existing provisions of the Brotherhood's Constitution, nor may any firemen who are not members of the Brotherhood attend meetings of its local lodges.

Appellants advance a double-barreled hypothesis, which roughly parallels the two judicial approaches to racial segregation in public education. Their first argument is that, inasmuch as racial exclusion from public schools is inherently a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment [*Brown* v. *Board of Education*, 347 U. S. 483 (1954)] and of due process of law guaranteed by the Fifth Amendment [*Bolling* v. *Sharpe*, 347 U. S. 497 (1954)] it follows that denial of membership in the duly elected statutory bargaining representative, based upon race, is inherently incompatible with the rights afforded by the Fifth Amendment to the Constitution of the United States and by the equal protection and equal representation guaranteed to them by the doctrine of *Steele* v. *Louisville and Nashville Railroad Co.*, 323 U. S. 192 (1944). There, the Supreme Court held that "the language of the [Railway Labor] Act * * * read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them. * * *" [323 U. S. 192, 202-3]. In short, appellants' first argument is that, as a matter of law, their constitutional rights and those enumerated in the *Steele* case are denied them as long as they are ineligible for membership in the exclusive collective bargaining agency which undertakes to represent their craft. They state in their brief: "Denial of voice and vote in the election of bargaining representatives and the formulation of bargaining objectives in and of itself denies Negro firemen equal representation."

If denial of membership in the Brotherhood is held to be not in violation of their rights as a matter of law, appellants assert that they are entitled to membership on a second and alternative ground. Cases decided under the earlier "separate but equal" doctrine of public schooling proscribed racial exclusion where in fact equal schooling was denied. See *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sweatt* v. *Painter*, 339 U. S. 629 (1950). Analogizing their case to the stated doctrine, these appel-

lants assert that the Brotherhood is in fact guilty of discriminatory practices and that the removal of the racial barrier to Brotherhood membership alone will afford them some measure of relief from discrimination.

In his carefully considered opinion, Chief Judge Paul Jones decided the facts pertaining to discrimination adversely to the contention of appellants. He stated the position of the Negro firemen to be that the "Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the Negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the Negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70." The Judge continues: "* * * these alleged acts of discrimination [will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discriminating against the Negroes." 156 F. Supp. 89, 90.

A meticulous examination of the detailed record in this case has been made by us, resulting in our opinion that the above findings of the district court are eminently correct and are supported by substantial evidence. There is, therefore, no occasion for further consideration of appellants' second argument.

Accordingly, we address ourselves solely to the contention advanced by the appellants that exclusion from membership in their collective bargaining representative based upon race is inherently a denial of their rights as a matter of law.

The appellee's authority as collective bargaining "representative" of the fireman craft is derived from the Rail-

way Labor Act, which contains, *inter alia*, the following definition: "Sixth. The term 'representative' means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U. S. C. A. 151. The Brotherhood was duly elected as bargaining representative in accordance with provisions of the Act. Nowhere does the statute manifest the intention of Congress to establish criteria for membership in the bargaining representative. Nor can it be said that the attention of the Congress was not directed to the fact that some craft members were being denied membership in certain railway labor organizations by virtue of their race. An amendment to the Act (later tabled) proposed to refuse certification to any such organization which denied membership on the basis of race. The able district judge observed: "Apparently the Act itself would not have been acceptable to the Congress if Negro membership in the agent had been required." 156 F. Supp., at page 93. The Supreme Court points out in its opinion in the *Steele* case, *supra*, that "the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership * * *." 323 U. S. at page 204. In our judgment, the language of the statute does not support reasonably any other interpretation.

A perusal of the Railway Labor Act makes it abundantly clear that no means of direct control over the actions of the agent selected by a majority of the craft was reserved by the statute to the individual employees. Apparently, the only supervision which any individual may exercise over the duly-elected bargaining representative is the threat of casting his vote in favor of a different representative at a subsequent election. The objective of Congress was industrial tranquility in the arteries of commerce. In choosing the method by which this goal could be achieved, it was deemed necessary to take from individual employees the right to negotiate their own contracts of employment. The question presented on the record before us is whether or not the Congress transcended the constitutionally protected rights of individual employees

when it stripped them of their bargaining privileges as individuals and conferred that function upon a majority-elected representative, over which the individual has no direct control and in which he is not eligible for membership. It is not contended that the Negro firemen are deprived of their voting rights in the election of a bargaining representative. Their complaint is that they are a minority group whose rights are abridged, for the reason that, as a result of their ineligibility for membership in the appellee Brotherhood, they have no control over the internal affairs of the representative elected by the majority.

Although these proceedings have been punctuated by accusations of racial discrimination, it would seem that we are really concerned only with ascertaining the rights of any person who, for any reason, finds himself in a minority or out-voted status, the issue of actual discrimination by the Brotherhood having been subtracted from the issue by the findings of the district judge, as hereinbefore stated. Various facets of the collective bargaining process involving the rights of the minority have already been litigated before the Supreme Court. That tribunal has decided against the validity of agreements respecting changes of pay negotiated by individuals after pay rates had been established by collective agreement. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U. S. 342.

Individual contracts of employment have been held to be superseded by collective agreements subsequently entered into by the employer and the craft representative. *J. I. Case Co. v. N. L. R. B.*, 321 U. S. 332. There, the Supreme Court discussed at length the underlying principles of the collective bargaining process, with no indication of Constitutional infirmity: "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment. * * * The workman is free, if he values his own bar-

gaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will generally in practice go in as a contribution to the collective result." 321 U. S. 332, 338, 339.

There are other decisions of the Supreme Court approving Acts of Congress which, in a limited way, interfere with the right of an individual to negotiate for employment-contract provisions palatable to his individual taste. On the subject of the power of the Congress to facilitate the flow of interstate commerce by enacting the union shop amendments to the Railway Labor Act, the highest tribunal said: "Industrial peace along the arteries of commerce is a legitimate objective; and Congress has great latitude in choosing the methods by which it is to be obtained. * * * The task of the judiciary ends, once it appears that a legislative measure adopted is relevant or appropriate to the constitutional power which Congress exercises. The ingredients of industrial peace and stabilized labor-management relations are numerous and complex. They may well vary from age to age and from industry to industry. What would be needful one decade might be anathema the next. The decision rests with the policy makers, not with the judiciary." *Railway Employees' Department* v. *Hanson*, 351 U. S. 225, 233, 234.

The wisdom of this policy of judicial self-restraint was recognized here in the opinion of the United States District Court: "* * *. To compel by judicial mandate membership in voluntary organizations where the Congress has knowingly and expressly permitted the bargaining agent to prescribe its own qualifications for membership would be usurping the legislative function. The Congress has entered the field of, and made provision for, labor relations and furnished means of adjusting labor disputes between employers and employees of interstate railways. For injustices due to discrimination or inadequate representation and participation to employees who are not members of the bargaining agent, the employees must look to the legislative, not the judicial branch of constitutional government." 156 F. Supp. 89, 93.

The Fifth Amendment to the Constitution of the United States protects the fundamental rights of individuals from invasion by federal governmental action. Unlike the Fourteenth, that amendment contains no equal protection guarantee. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584 (1937); *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Appellants insist that we, by interpretation, should expand the due process clause of the Fifth Amendment to encompass an equal protection guarantee in the same manner that the Supreme Court recently accomplished that result in the field of public education, in *Bolling* v. *Sharpe*, 347 U.S. 497. Assuming, (without deciding) that we should place such an interpretation on the Fifth Amendment, appellants, in our judgment, are still not entitled to the relief sought, for the reason that this record does not show an agency of the federal government to have been responsible for appellants' plight.

The accusing finger is pointed at the Congress. Only one analysis could tend to lay the responsibility for appellants' situation on our national legislative branch of government; that is, the violation of the Fifth Amendment by the Congress, in its enactment of the Railway Labor Act without including therein a provision requiring a labor union—when duly elected as collective bargaining representative of a craft—to extend membership privileges to all members of the craft, regardless of race. We cannot accept this fine-spun hypothesis, which charges the Congress with federal action of a type proscribed by the Fifth Amendment.

Recent decisions of the Supreme Court in the field of administration of public schooling are not analogous to the instant case. *Brown* v. *Board of Education* and *Bolling* v. *Sharpe*, *supra*, were predicated on the fact that *affirmative* legislation of the states and the District of Columbia, respectively, denied Negroes access to schools supported by public tax funds. These decisions are not applicable here.

The Brotherhood is a private association, whose membership policies are its own affair, and this is not an appropriate case for interposition of judicial control. A de-

cision to the contrary could be frustrated by the simple expedient of the majority's electing directly those individuals presently designated by the union to negotiate with the employer railroads. There is no requirement that employees be represented by persons of the same race. In *National Federation of Railway Workers* v. *N. M. B.*, 110 F. (2d) 529, 538; certiorari denied, 310 U. S. 628, it was said that "under the Act, employees are guaranteed the right to select a common bargaining representative and that representative may be a person of any race or color (or association made up of persons of any race or color). The quality of opportunity thus guaranteed is the complete antithesis of discrimination. To hold that colored employees could be represented only by colored persons for bargaining purposes would be to introduce into the administration of the Act the very discrimination which the Federation seeks to avoid."

For the reasons stated herein and those found in the opinion of the United States District Judge, the judgment is affirmed.

This case was argued to a panel of the court consisting of Martin, Miller and Stewart, Circuit Judges. Judge Stewart became an Associate Justice of the Supreme Court of the United States before a decision was reached or this opinion was prepared. He, therefore, did not participate in the decision, opinion, or judgment in this case.

APPENDIX B

PERTINENT PROVISIONS OF THE RAILWAY LABOR ACT

45 U.S.C. § 151.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

* * * * * * *

45 U.S.C. § 152.

Second. All disputes between a carrier or carriers and its or their employees shall be considered and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice,

and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice; *And Provided Further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in

the manner prescribed in such agreements or in section 156 of this title.

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.